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3 UNITED STATES DISTRICT COURT
4 SOUTHERN DISTRICT OF NEW YORK
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6 PLUMBERS & PIPEFITTERS
7 NATIONAL PENSION FUND, *et al.*,

8 Plaintiffs,

9 v.

10 13 Civ. 5696 (JGK)

11 ORTHOFIX INTERNATIONAL N.V.,
12 *et al.*,

13 Defendants.

14 April 29, 2016
15 3:05 p.m.

16 Before:

17 HON. JOHN G. KOELTL,

18 District Judge

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1 APPEARANCES

2 COHEN, MILSTEIN, SELLERS & TOLL, PLLC
3 Attorneys for Plaintiffs
BY: DANIEL S. SOMMERS
CAROL V. GILDEN
GENEVIEVE O. FONTAN

5 HOGAN LOVELLS, US, LLP (NYC)
6 Attorneys for Defendant Orthofix
BY: DAVID F. WERTHEIMER
KEVIN BOWMAN

7 LANKLER, SIFFERT & WOHL
8 Attorneys for Defendant McCollum
BY: LEIGH G. LLEWELYN

9 PAUL HASTINGS, LLP (NY)
10 Attorneys for Defendant Vaters
BY: SHAHZEB LARI

11 KING & SPALDING, LLP (NYC)
12 Attorneys for Defendant Buxton
BY: ERIC A. HIRSCH

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1 (Case called)

2 MR. SOMMERS: Good afternoon, your Honor. Daniel
3 Sommers, Cohen, Milstein, Sellers & Toll on behalf of leading
4 plaintiff, and with me this afternoon are Genevieve Fontan and
5 Carol Gilden from my firm.

6 THE COURT: Good afternoon.

7 MR. WERTHEIMER: Good afternoon, your Honor. David
8 Wertheimer, Hogan Lovells for Orthofix International, and with
9 me is my colleague Kevin Bowman.

10 MR. LLEWELYN: Good afternoon, your Honor. Leigh
11 Llewelyn of Lankler, Siffert & Wohl for Brian McCollum.

12 MR. LARI: Good afternoon, your Honor. Shahzeb Lari
13 from Paul Hastings for Defendant Vaters.

14 MR. HIRSCH: Good afternoon, your Honor. Eric Hirsch
15 from King & Spalding for Defendant Emily Buxton.

16 THE COURT: Good afternoon, all.

17 This is a motion to approve the settlement and approve
18 the application for attorney's fees and to approve the
19 settlement class for the purposes of the settlement.

20 Okay. I have read the papers. I am happy to listen
21 to you all.

22 MR. SOMMERS: Your Honor, Daniel Sommers again for the
23 lead plaintiff.

24 As the Court mentioned, before the Court is the motion
25 for final approval of the proposed settlement. The settlement

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1 provides for, among other things, a payment of \$11 million to
2 the class. If granted final approval, the settlement would
3 resolve all claims and all defenses in this litigation. In
4 accordance with the Court's December 18, 2015 order
5 preliminarily approving the settlement, a notice program was
6 commenced. In connection with that program 15,562 notices were
7 disseminated to identifiable class members. In addition,
8 summary notices were published in the PR Newswire and in
9 Investors Business Daily on January 20th. Likewise, a website
10 was established pursuant to the Court's order by the settlement
11 administrator, and on that website all of the relevant
12 documents in connection with this settlement had been posted
13 including the redacted version of the supplemental agreement,
14 per your Honor's instructions.

15 That website, as of April 20th, received over 1,300
16 inquiries from potential class members. In addition, the
17 settlement administrator established a toll-free number for
18 investors to call if they had questions and that has been
19 accessed as well.

20 As of April 7th, which was the deadline for filing
21 objections and requests for exclusion from the class, not a
22 single objection was received and not a single request for
23 exclusion has been received, facts that we consider to be
24 significant in consideration of a fairness and reasonableness
25 and adequacy to the settlement.

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1 THE COURT: April 7th was the deadline. By bringing
2 it up right to today, have you received any objections?

3 MR. SOMMERS: There have been no objections received
4 as of today, certainly to my knowledge. It would have been
5 called to my attention.

6 THE COURT: Right.

7 MR. SOMMERS: And there have been no requests for
8 exclusion that have been received up to this moment, again, as
9 far as to my knowledge.

10 An addition and important fact is that as of the
11 claims filing deadline which was April 6th of this year, 4,733
12 claims were filed pursuant to the declaration put in by the
13 settlement administrator. We have been advised that
14 subsequently 99 additional claims have been filed bringing the
15 total to 4,832 claims filed.

16 With respect to the settlement, I would like to just
17 address it in two parts.

18 THE COURT: Do you have some estimate with 4,832
19 claims how much each claimant will then get?

20 MR. SOMMERS: I don't, your Honor, and candidly it is
21 a bit early in the process. When I reference that claims had
22 been filed, I would expect that most of them will be valid in
23 whole or in part but it is certainly possible that some will
24 ultimately be determined to be invalid and the administrator's
25 process has not yet gotten to the point of actually calculating

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1 what the recognized loss would be for each of those potential
2 class members.

3 THE COURT: Okay.

4 MR. SOMMERS: With respect to the settlement and the
5 briefing that we put in as to why we believe the settlement is
6 fair, reasonable, and adequate, I would first like to just
7 address the process by which the settlement was reached as
8 indicia of the fairness and reasonableness and adequacy of the
9 settlement.

10 The settlement was only reached after there had been
11 substantial work performed by lead counsel. We had done a
12 significant pre-filing investigation before the filing of the
13 two amended complaints that were submitted in this matter. We
14 identified over 160 witnesses, many of whom were in various
15 countries in South America and Europe and interviewed 59 of
16 them including, in some cases, interviewing witnesses more than
17 once. We drafted two extensive complaints, the second of which
18 was ultimately tested by a very comprehensive motion to dismiss
19 filed by the group of defendants that are here and one
20 additional defendant raising multiple legal issues. That
21 motion was ruled on by the Court, denied as to all defendants,
22 save one. After that ruling, we began negotiations over the
23 terms of a very extensive document production which ultimately
24 resulted in our receipt of four and a half million pages of
25 materials from Orthofix. All of those materials were subject

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1 to an extensive review process by lead counsel for the
2 plaintiffs.

3 At the same time, we embarked on non-party discovery
4 including serving 13 subpoenas on U.S.-based entities, one of
5 which was Ernst & Young which acted as the outside auditor for
6 Orthofix. At the same time, we also commenced the process of
7 seeking documents from 12 non-U.S. entities utilizing the
8 rather complicated procedures of the Hague Convention and
9 letters rogatory and we had to call on the Court's assistance
10 here to effectuate some of that but we were able to seek
11 documents from various countries including Brazil, Columbia,
12 Mexico, Italy, Spain, Greece, South Korea, the United Kingdom
13 and Turkey and not from the companies but customs and business
14 entities that did business in those countries.

15 We also had the opportunity to engage experts to
16 consult within the areas of accounting which were central to
17 the allegations in this case. Because of the international
18 nature of the case, we had to engage the services of
19 translators and others to assist us in navigating the non-U.S.
20 discovery portion of the case and, in addition, we had
21 consulted with an expert in the area of causation, materiality,
22 and damages.

23 On top of all of that, as the Court knows, we agreed
24 to engage in private mediation process.

25 THE COURT: The discovery process never got to the

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1 point of actually taking any depositions?

2 MR. SOMMERS: There were no formal depositions taken
3 in this case, your Honor. In the mediation process we engaged
4 a well-regarded mediator, there was a very thorough process,
5 extensive mediation briefs were submitted. I think we
6 referenced in our papers that we, alone, submitted
7 approximately 100 exhibits culled from the massive amount of
8 documents that we had obtained in the case. In addition, the
9 mediation process was engaged in by very capable counsel.
10 Orthofix was not only represented by litigation counsel, it had
11 insurance counsel and so the process was, in our view, a fair
12 process by which the settlement was reached, the parties were
13 fully informed, certainly lead plaintiffs were fully informed
14 about the risks and weaknesses and strengths of the case.
15 There was a credible mediation process that took place and the
16 entire process was fully adversarial, at arm's length, and I'm
17 not aware of any evidence to the contrary.

18 With regard to the substance and to the standards that
19 the Second Circuit have set forth in the *Grinnell* case, we
20 believe that the settlement satisfies each of the standards
21 that the *Grinnell* Court directed district courts to focus on.

22 First, with regard to the complexity, expense, and
23 likely duration of the litigation, 10b-5 class actions are well
24 known to be complex. This was a multi-party action, there were
25 complex accounting issues that were involved. As I had stated

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1 earlier, there was a significant non-U.S. component to the case
2 which raised a variety of discovery issues and evidentiary
3 issues that we did confront and would continue to confront had
4 the case continued. As a result of that, this case was an
5 expensive case to litigate, it required experts. It would have
6 required additional expenses had we continued on through the
7 discovery process, and moreover, in terms of duration on
8 appeals I think would be a certainty in this case. There were
9 a number of legal issues that were raised on motion to dismiss
10 that were likely to be subject of appeal.

11 THE COURT: Your requests for some discovery under the
12 Hague Convention were rejected by the countries to which they
13 were directed, weren't they?

14 MR. SOMMERS: No, your Honor. My recollection is not
15 clear as between those which were the Hague Convention and
16 where we used the letters rogatory but we actually, as we
17 approached the mediation process in late September of last
18 year, were receiving responses from the various judicial
19 authorities in certain countries, that those responses were
20 forthcoming. We had to put those on hold because we had
21 achieved an agreement in principal. But, I don't recall that
22 any country flatly rejected our request. I don't know whether
23 we would have been successful, ultimately, in obtaining
24 documents from various countries. That, of course, remains --

25 THE COURT: I thought I had recalled some returns from

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1 some countries which had rejected the request for documents as
2 discovery that was not permitted under the rules of those
3 countries.

4 MR. SOMMERS: Your Honor's recollection is better than
5 mine. I have just been informed that two countries did in fact
6 reject the request -- South Korea and the United Kingdom -- and
7 then there were a variety of other countries that were in the
8 process of trying to comply but did not.

9 The second factor that the *Grinnell* Court points to
10 and one which we find is very significant is the action of the
11 class to the settlement. As I indicated earlier, we have not a
12 single objection, not a single request for exclusion. The
13 settlement provided that the defendants were to send out a
14 notice that was required by CAFA and the Class Action Fairness
15 Act to various state and federal law enforcement officers. We
16 had not a single negative response or any response from that.

17 So, all of these factors we think give the Court a
18 sufficient amount of negative assurance that there was -- there
19 is no opposition to approval of the settlement but, more
20 importantly, I think the Court has affirmative evidence now
21 because the claims deadline has passed and the Court now knows
22 of the substantial class members who are affirmatively seeking
23 to participate in the class. And so, we have a claims rate now
24 of close to 30 percent which for these types of cases is at the
25 very high end and we think speaks powerfully to support

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1 approval of the settlement. And, moreover, we have the
2 affirmative support of a lead plaintiff in this case which is a
3 sophisticated institutional investor and believe that carries
4 weight through and gives the court affirmative assurances to
5 reaction of the class.

6 THE COURT: Do you know of the other claimants? How
7 many institutional investors who were claimants?

8 MR. SOMMERS: Yes, your Honor.

9 The class is predominantly comprised of institutional
10 investors. During the class period our data shows that 90
11 percent of the shares of or Orthofix were institutionally held
12 by a variety of institutions. I have not looked to see who the
13 specific members are but we do know that this class is a class
14 that is comprised, principally, of sophisticated investors and,
15 again, another factor which we think speaks favorably toward
16 approval of the settlement.

17 The stage of proceedings is another factor the Second
18 Circuit looks to. Here, as I stated earlier while we did not
19 get into deposition discovery, there was substantial informal
20 discovery, substantial investigation, and all the other items
21 that I have addressed -- the complaints, the motion practice,
22 the extensive document discovery that took place, the
23 consultation with experts -- the case was substantively fairly
24 well advanced and certainly put counsel in a position to
25 understand the strengths and weaknesses and the risks involved

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1 in continuing litigation.

2 The fourth factor that sort of blends in with the
3 other factors I have discussed which is the risks of
4 establishing liability and damages, and certainly the Court is
5 well aware that one of the principal issues in this case would
6 be our ability to ultimately plead that each of the defendants
7 acted with the requisite state of mind -- scienter -- while the
8 Court ruled on the motion to dismiss. Obviously that was on
9 the pleadings and we ultimately would need to not only plead
10 that sufficiently but to prove it and that was going to be a
11 hotly contested issue. In addition, Orthofix had a unique
12 defense which is that we had not adequately pled its
13 scienter -- corporate scienter -- and that would be a special,
14 unique issue as to the company.

15 The defendants also continue to raise issues of
16 causation and fact, also materiality, which presented clear
17 risks in the case.

18 As to damages, that was a hotly contested issue. Some
19 of the material we have put into the record both on our
20 preliminary approval motion and on the motion that the Court is
21 considering today show that there were vastly divergent views
22 about damages. It would have been a battle of experts as to
23 what the jury would have believed as to the proper approach to
24 damages and of course the defendants' principal argument is
25 that there were no damages at all.

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1 Finally, the Second Circuit looks to the
2 reasonableness of the settlement in light of the best possible
3 recovery and the attendant risks along with that and here, as
4 we addressed in the preliminary approval order, we believe that
5 the recovery that we have obtained for the class falls squarely
6 within the range of a very good recovery between 10 and 20
7 percent of what we believe would be our proveable damages. 20
8 percent of the lower end and 10 percent of the most aggressive
9 damage model and, as we put it previously, the defendant's
10 damage model was completely different and that showed a range
11 of recovery for us under their theory of 70 to 120 percent.
12 But, under any of those numbers, we believe that the recovery
13 here is reasonable, falls well within the range of what the
14 Courts have approved in other cases.

15 So, your Honor, those are the comments with respect to
16 the settlement we addressed at the preliminary approval hearing
17 plan of allocation. I can go through that unless the Court
18 wants me to stop here for a moment.

19 THE COURT: No.

20 MR. SOMMERS: Okay.

21 THE COURT: Why don't you move on to attorneys fees.

22 MR. SOMMERS: Okay.

23 Your Honor, we have requested a fee of 27.5 percent of
24 the settlement fund. There were \$3,025,000 reflecting 679
25 hours of work taken in this case as a result of lodestar with a

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1 product of the hours times the hourly rate of \$3,253,076.

2 For the Court's interest, I did go and look at what
3 that would translate to on a blended hourly rate and that rate
4 is \$446.

5 THE COURT: Sorry.

6 MR. SOMMERS: The rate, \$446 blended hourly rate for
7 all the time keepers.

8 THE COURT: That includes all the contract lawyers?

9 MR. SOMMERS: It does, your Honor.

10 THE COURT: The notice said up to 28 percent.

11 MR. SOMMERS: It did, and our request here is 27.5.

12 I would reiterate again that that was disclosed to the
13 class, the ceiling of our fee request, and that our submission
14 was put in before class members were required to elect whether
15 they were going to object to any aspect of the application and
16 again, not a single class member including all of the
17 sophisticated class members lodged any objections.

18 So, we think that the fee request is reasonable both
19 under the percentage of the fund approach and also under a
20 lodestar analysis. With respect to that analysis, the Second
21 Circuit in *Goldberger* set forth the principal standards for the
22 Court to look at. Some of these overlap with some of the
23 things I have said previously and I won't repeat them but the
24 Court looks to the time and labor expended and, clearly, a
25 substantial amount of time and labor was expended in achieving

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1 this result.

2 The second factor from Goldberger talks about the
3 risks assumed in pursuing the action and as the Court is aware,
4 this action was taken on a wholly contingent basis.

5 Plaintiff's counsel has not received any compensation since the
6 inception of this action. We have expended over \$200,000 in
7 litigation expenses and none of those have been reimbursed to
8 us at this point. And there was certainly no certainty that
9 this case would result in a positive recovery, notwithstanding
10 the fact that there was a restatement which does put out of
11 place certain elements of a 10b case. It is law in this
12 circuit that a statement alone does not equate to proof of
13 scienter, that that takes more than just the fact of the
14 restatement and the defendants certainly had asserted strong
15 defenses here. So, there were significant risks as to
16 liability, as to damages, and there were practical risks that
17 we faced especially with respect to the non-U.S. component of
18 the case where there were significant questions about our
19 ability to access discovery outside of the U.S. and, if we did,
20 there might be questions about the admissibility of some of the
21 evidence that we attempted to get.

22 The next factor is the magnitude and complexity of the
23 case and we addressed this a little bit earlier but we believe
24 this case certainly falls within the category of a complex
25 case. There were many issues involved and complex accounting

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1 issues, complex damages and causation issues.

2 The Second Circuit also requires the Court to look at
3 the quality of representation and we believe that the
4 representation in this case was good, that the class was well
5 represented. Obviously it is for the Court to make a decision
6 on that.

7 Finally, there are public policy considerations that
8 the Second Circuit identifies or directs the district court to
9 review. We believe this case is a good example of where
10 private securities action fulfills the mission of the federal
11 securities laws and the anti-fraud provisions of the securities
12 laws. We have achieved a meaningful recovery for the class, a
13 fund of gross fund of \$11 million, and we did note in our
14 papers and I think it is worth noting that the enforcement
15 division of the Securities and Exchange Commission has taken a
16 look at the same matters that are the subject of this
17 litigation, that it served the subpoena on Orthofix. I don't
18 know much more about what the enforcement division was doing,
19 is doing now or may do in the future, but with all of the
20 advantages that the SEC has and all of the disadvantages that a
21 private litigant has, we were able to achieve a substantial
22 settlement fund now for investors. So, we believe that that
23 speaks well of the settlement and speaks well for the fee
24 application.

25 The other factors that we believe support the fairness

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1 of the fee request are going through the process that the Court
2 would go through, we looked to see what would be a fair range
3 of fees for this type of a case. We believe that 27.5 percent
4 falls within that range. I certainly recognize that in cases
5 courts have awarded less, sometimes a lot less, sometimes more,
6 and that there is no magic to the precise correct number. But,
7 we looked at data we provided for the Court, a study done by
8 NERA which identified the median fee award in the last four or
9 five years for a case within this range of 27.5 percent. There
10 are also cases obviously within that range that we cited in our
11 brief. So, we believe those are supportive of the
12 reasonableness of the fee.

13 We also look to the absence of any objections, the
14 affirmative claims rate which we think is important, the
15 affirmative support of the lead plaintiff which was set forth
16 in the Sweeney declaration, and as we discussed a little
17 earlier, the substantial institutional class membership and
18 participation and lack of any objection as to the 27.5 percent
19 requested fee.

20 At the same time, we can look at the lodestar analysis
21 and we believe it corroborates the reasonableness of the fee we
22 are requesting. We are not seeking any multiplier in the case.
23 In fact, it is sometimes referred to as a negative multiplier,
24 a .93 of our total lodestar amount, and we think the total
25 hours that were worked were reasonable and necessary in a case

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1 of this magnitude. The fee requested is not going to result in
2 a windfall for plaintiff counsel. And I would also like to
3 point out that the allocation of time between partner time and
4 associate time in the case we believe was reasonable, and we
5 looked at the hours approximately 17 percent of the time worked
6 in the case was partner time and the balance non-partner time,
7 I think.

8 THE COURT: About half was contract lawyers time.

9 MR. SOMMERS: It was. There was a significant amount
10 of contract lawyer work which was done to assist us in
11 reviewing documents. That was principally why we did that.

12 So, we think all of these factors confirm why we think
13 that the fee that we are requesting is fair and is a fair and
14 reasonable fee under all the circumstances involved in the
15 case.

16 THE COURT: Okay. The only change on page 24 of your
17 brief with the corrected page was you were seeking \$1,853 for
18 the lead plaintiff, right?

19 MR. SOMMERS: That's correct, your Honor. I apologize
20 for that error.

21 THE COURT: No. That's all right.

22 MR. SOMMERS: We just got that the other day.

23 THE COURT: Okay. Thank you.

24 Defendants?

25 MR. WERTHEIMER: Your Honor, I have nothing to add.

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1 What plaintiffs counsel has said as to the reasonableness,
2 fairness, adequacy of the settlement and so forth and take no
3 position on the plaintiff's application for counsel fees. I am
4 happy to address any questions the Court might have.

5 THE COURT: No. Thank you.

6 Individual defendants?

7 MR. LLEWELYN: Nothing for Defendant McCollum, your
8 Honor.

9 MR. LARI: Your Honor, nothing for Defendant Vaters.

10 MR. HIRSCH: Nothing for Defendant Buxton, your Honor.

11 THE COURT: Okay. I have reviewed the papers and I
12 find that the settlement is fair, reasonable, and adequate.
13 The recitations in the proposed order and final judgment are
14 correct. They reinforce the findings that he had made on the
15 preliminary approval of the settlement. The settlement was
16 procedurally fair, it was arrived at at arm's length with no
17 indication of any collusion, it was arrived at with the
18 assistance of a mediator. It is substantively fair, it is the
19 resolution of a complex case that would have taken significant
20 additional resources to arrive at a final conclusion. There
21 would have been a risk that the plaintiffs would not have
22 succeeded at the end of the day. The motion to dismiss was
23 denied in substantial part but that was based on the pleadings.
24 It would have been a difficult and complex case to proceed
25 through discovery and trial. Substantively, the recovery of

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\$11 million represents 10 percent of the plaintiffs' most aggressive damages estimate and 20 percent of the plaintiffs' more conservative estimate. The defendant's damages expert disagreed with the plaintiffs' estimated damages and would have come up with a damages estimate to the extent that there were damages of about 8 to 14 percent of the plaintiffs' damages estimate so that the settlement was substantively fair given the possibilities of what the plaintiffs could have recovered at the end of trial.

So, I will approve the settlement. I will approve the definition of the class for purposes of the settlement. I will also find that the notice was the best notice practical under the circumstances and satisfies Rule 23 and due process. I will also approve the attorney's fee, as sought. It would not be uncommon for me to reduce an attorney's fee that was sought but in this case the attorney's fee came in at a reasonable attorney's fee under any reasonable benchmark. The award of 27.5 percent is slightly less than the class was advised would be sought. The lodestar -- the 27.5 percent translates to \$3,025,000 which is slightly less than the lodestar \$3,252,076.25. The multiplier is actually a negative, the multiplier is .93 of the lodestar. So, the plaintiff is not seeking an enhancement of the lodestar and the lodestar is reasonable.

There was a substantial amount of effort and

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1 reasonable attorneys fees that went into the factual
2 development of the case. There were a large number of witness
3 interviews that were conducted as well as the substantial
4 amount of documentary review. The attorneys fees were
5 efficiently expended. There were a large number of contract
6 attorney hours that went into document review. The ultimate
7 hourly rate was reasonable. Moreover, it's plain that from
8 today forward there will continue to be attorney's fees
9 expended in terms of the supervision of the class distribution
10 and other issues that will arise in terms of the administration
11 of the settlement, none of which will be separately compensated
12 but which would be included within the attorney's fee that is
13 being sought. That will drive the multiplier down even
14 further.

15 It is particularly significant in approving the
16 settlement and approving the attorney's fee that there have
17 been no objections from the class and no opt-outs from the
18 class and a significant number of claims that have already been
19 filed. With respect to the attorneys fees, there have been no
20 objections to the attorneys fee despite the existence of
21 institutional investors. The attorneys fee has also been
22 approved by the plaintiff who is a sophisticated investor. So,
23 I should also add that the 8,153.60 payment to the plaintiff
24 for time expended by the plaintiff is also reasonable.

25 So, taking all of those factors into account I will

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1 sign the order and final judgment. I will also sign the
2 attorneys' fees order for the amounts requested. I have gone
3 over the orders and didn't find any reason to change any part
4 of them.

5 Okay. I have signed both orders and we will put them
6 on ECF.

7 Anything further?

8 MR. SOMMERS: Nothing from the lead plaintiff, your
9 Honor. Thank you very much.

10 MR. WERTHEIMER: Nothing from Orthofix, your Honor,
11 but thank you very much for your overseeing the case.

12 THE COURT: Okay. Good afternoon, all.

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